Supreme Court, U. S.
FILED
AUG 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1476

J. W. BATESON COMPANY, INC., et al., *Petitioners*

v.

UNITED STATES OF AMERICA for and on behalf of the Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals is reported at 551 F. 2d 1284.[1]

[1] The opinion of the Court of Appeals is also printed in full in the appendix to the petition for a writ of certiorari filed herein, pp. 1a-6a.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on January 28, 1977 (A. 64). A timely petition for rehearing, or, in the alternative for hearing *en banc*, was denied on February 16, 1977 (A. 4, 66). The petition for a writ of certiorari was filed on April 25, 1977, and certiorari was granted on June 27, 1977 (A. 68). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether union trustees, seeking recovery of unpaid fringe benefit funds and union dues required to be withheld under a collective bargaining agreement from the wages of employees of a sub-subcontractor on a federal construction project, may sue to recover such monies under the Miller Act, 40 U.S.C. § 270a, *et seq.*, where neither the union trustees nor the employees of the sub-subcontractor have any direct contractual relationship with either the prime contractor or a subcontractor of the prime contractor.

2. Whether the Court of Appeals' decision, extending the coverage of the Miller Act to union trustees who have no contractual relationship with either the prime contractor or a subcontractor, which decision is in conflict with the decisions of the Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits, has misinterpreted this Court's opinions in *Clifford F. MacEvoy Co.* v. *United States ex. rel. Calvin Tomkins Co.* and *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*

STATUTE INVOLVED

The Miller Act, 40 U.S.C. § 270b(a), as amended, provides:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefore before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is due, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshall of the district in which the public improvement is situated is authorized by law to serve summons."

STATEMENT OF THE CASE

1. *Material Facts.* On or about August 10, 1971, petitioner, J. W. Bateson Company (hereinafter "Bateson"), entered into a written prime contract with the United States of America, acting by and through the General Services Administration, for the construction of an addition to the Howard University Hospital building in the District of Columbia (A. 4, 7, 26, 52).

On August 12, 1971, Bateson, in conjunction with the other named petitioner sureties, duly executed and delivered to the United States a payment bond (hereinafter "Miller Act bond") in accordance with the provisions of the Miller Act, 40 U.S.C. § 270a, *et seq.*, as amended, in the sum of $2,500,000.00, to protect the class of persons, within the contemplation of the statute, who furnish labor or materials for a government construction project (A. 7, 8, 16-18, 52).

Thereafter, Bateson entered into a subcontract with Pierce Associates, Inc. (hereinafter "Pierce"), which subcontract obligated Pierce to perform a portion of the work specified in the original contract between Bateson and the United States (A. 8, 38). Subsequently, Pierce entered into a sub-subcontract with Colquitt Sprinkler Company, Inc. (hereinafter "Colquitt") to provide the materials and labor required to install a sprinkler system in the addition to the Howard University Hospital (A. 8, 36, 38).

Respondent, Road Sprinkler Fitters Local Union No. 669, U.S. (hereinafter "Local 669") is an unincorporated labor union representing sprinkler fitters employed by sprinkler contractors including Colquitt (A. 6, 45, 51).

Respondents, Trustees of the National Automatic Sprinkler Industry Pension Fund, the National Automatic Sprinkler Industry Welfare Fund and the National Automatic Sprinkler Local 669, U.S. Educational Fund (hereinafter "Trustees") are the trustees of the employee fringe benefit trust funds established by the Collective Bargaining Agreement (hereinafter "Agreement") between the National Automatic Sprinkler and Fire Control Association (hereinafter "Association") and Local 669 (A. 6, 10-15, 45).

Colquitt is a party to the Agreement. However, Colquitt is not a member of the Association, therefore, it was necessary for Colquitt to separately sign the Agreement in order to be bound by its provisions (A. 5-9).

This action involves claims against the Miller Act bond for unpaid fringe benefit contributions and monies withheld from the wages of the employees of Colquitt during the period May 1, 1973 through December 1, 1973, while said employees were engaged in the installation of a fire sprinkler system at the Howard University Hospital project.

2. *The Proceedings Below.* Respondents filed their complaint against petitioners in the United States District Court for the District of Columbia on May 9, 1974 (Civil Action No. 74-699) (A. 5-9). The basis for jurisdiction in the District Court action as set forth in the complaint was the Miller Act, 40 U.S.C. §§ 270a and 270b, as amended (A. 5-9). In response to the complaint, the petitioners filed on May 23, 1974, a motion to dismiss the complaint for failure to state a claim, or, in the alternative, on the ground that the court lacked jurisdiction over the subject matter of the complaint (A. 1, 19). In their motion, petitioners maintained that

respondents lacked standing to sue under the Miller Act, 40 U.S.C. § 270a, *et seq.*, because they had no contractual relationship with either the prime contractor or with a subcontractor as required by 40 U.S.C. § 270b (a). Respondents filed their response to the motion on June 13, 1974 (A. 1), and petitioners filed a reply to respondents' response on June 18, 1974 (A. 1). On July 3, 1974, the District Court entered an order denying the motion to dismiss (A. 1, 20). In denying petitioners' motion, the District Court interpreted this Court's opinion in *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974) to require a holding that Colquitt was a "subcontractor" within the meaning of the Miller Act notwithstanding the fact that Colquitt was a third-tier subcontractor (sub-subcontractor) having no contractual relationship, direct or implied, with the prime contractor (A. 20).

On July 15, 1974, petitioners filed a motion to reconsider the motion to dismiss, or, in the alternative to certify the decision for interlocutory appeal (A. 1, 21). Respondents filed their response to petitioners' motion on July 23, 1974 (A. 1) and on July 26, 1974, the District Court denied petitioners' motion (A. 1, 24). On August 5, 1974, petitioners filed an answer to the complaint (A. 1, 25). Six months of discovery efforts by both parties thereafter ensued.

On February 18, 1975, petitioners filed a motion for summary judgment, together with a supporting memorandum which set forth three separate grounds in support of the motion: (1) that respondents waived their right to file a claim on the Miller Act bond; (2) that respondents are estopped from filing a claim on the Miller Act bond; and (3) that respondents lack

standing to file a claim on the Miller Act bond because they had no direct contractual relationship with either the prime contractor or a subcontractor (A. 1, 35, 36-41). On March 24, 1975, respondents filed a cross-motion for summary judgment along with two affidavits and a memorandum in support thereof and in opposition to petitioners' motion for summary judgment (A. 2, 42, 43-56). Respondents requested the court to grant partial summary judgment with respect to petitioners' liability for the monies claimed. On April 7, 1975, petitioners filed a memorandum in opposition to respondents' cross-motion for summary judgment (A. 2), and on April 17, 1975, respondents filed a reply to petitioners' memorandum (A. 2). Thereafter, on June 6, 1975, the District Court entered an order denying petitioners' motion for summary judgment and granting respondents' cross-motion for summary judgment (A. 2, 57).

On July 1, 1975, petitioners entered their notice of appeal to the United States Court of Appeals for the District of Columbia Circuit from the District Court's order dated June 6, 1975 (A. 2, 58). On September 19, 1975, respondents filed in the Court of Appeals a motion to dismiss the appeal on the ground that the appeal was not within the jurisdiction of the court because the order from which the appeal was taken was neither a final judgment under 28 U.S.C. § 1291, nor an appealable interlocutory order under 28 U.S.C. § 1292, absent proper certification from the District Court (A. 2, 59). On October 24, 1975, the Court of Appeals entered an order dismissing the appeal (A. 2, 60). Thereafter, on motion, the District Court certified its order dated June 6, 1975, for interlocutory appeal by order dated October 29, 1975 (A. 2, 61, 62). On November 4, 1975, pe-

titioners entered their second notice of appeal (A. 2, 63) and on December 10, 1975, the appeal was docketed by the Court of Appeals (No. 75-2199) (A. 3).

After briefs were filed by the parties, the case came up for oral argument before the Court of Appeals on December 9, 1976 (A. 4). On January 28, 1977, the Court of Appeals entered its opinion and judgment affirming the decision of the District Court (A. 4, 64). Petitioners thereafter filed a timely petition for rehearing, or, in the alternative for a hearing *en banc,* which was denied on February 17, 1977 (A. 4, 66, 67).

On April 25, 1977, petitioners filed their petition for a writ of *certiorari* which was granted by this Court on June 27, 1977 (A. 68).

SUMMARY OF ARGUMENT

The Court of Appeals held that union trustees, seeking recovery of unpaid benefit funds and union dues, which were required to be withheld by a sub-subcontractor on a federal construction project from the wages of its employees under a collective bargaining agreement between the sub-subcontractor and the union, may sue to recover such monies under the Miller Act, 40 U.S.C. § 270a, *et seq.*, notwithstanding the fact that neither the union trustees nor the employees of the sub-subcontractor had any direct contractual relationship with either the prime contractor or a subcontractor. Petitioners challenge the holding of the Court of Appeals for the reasons set forth herein.

I

The Court of Appeals misinterpreted this Court's decisions in *Clifford F. MacEvoy Co.* v. *United States*

ex rel. Calvin Tompkins Co.,[1] and *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*[2] In both of these decisions this Court recognized that a Miller Act claimant must have a contractual agreement with the prime contractor or with a subcontractor. The decision of the Court of Appeals is in error because it eliminates this requirement.

II

The decision of the Court of Appeals for the District of Columbia Circuit is contrary to the holdings of the Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits. Although these decisions pre-date this Court's decision in *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc., supra,* these decisions are consistent with this Court's decision in the *Rich* case and they are, in fact, correct interpretations of the law.

III

Congress clearly intended to limit the protection of a Miller Act bond to persons having a contractual relationship with either the prime contractor or a subcontractor. The Court of Appeals' holding that a sub-subcontractor was a "subcontractor" within the meaning of that term as used in the Miller Act, is contrary to the legislative intent.

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[1] 322 U.S. 102 (1944)

[2] 417 U.S. 116 (1974)

ARGUMENT

1. The Court Of Appeals Misinterpreted The Decisions Of This Court

Prior to this Court's decision in *F. D. Rich Co., Inc.*, v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974), the leading decision of this Court construing the Miller Act was *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tompkins Co.*, 322 U.S. 102 (1944).

The issue in *MacEvoy* was whether a person supplying materials to a materialman of a prime contractor can sue under the Miller Act. This Court held that he cannot. In fact, this Court said in *MacEvoy* that the right to sue on a Miller Act bond is limited to (1) those materialmen, laborers, and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give statutory notice of their claim to the prime contractor, 322 U.S. at 107-108. This Court said further that:

> "To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso [of 40 U.S.C. § 270b(a)] and to the expressed will of the framers of the Act. Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants." 322 U.S. at 108.

Although this Court in *MacEvoy* indicated that the Miller Act, like its predecessor, the Heard Act, Act of August 13, 1894, 50 U.S.C. § 270, as amended (1934 ed.), is highly remedial in nature and is entitled to a liberal construction and application in order to properly effectuate the Congressional intent to protect those furnishing labor or material on government projects, this Court said:

> "But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds." 322 U.S. at 107.

That the Miller Act provides a broad but not unlimited protection was also later recognized by this Court in *United States* v. *Carter*, 353 U.S. 210 (1957).[*]

The limitation recognized by this Court in *MacEvoy* was reaffirmed by this Court in *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, *supra*, where this Court said:

> "The rights afforded by the act are limited, however, by the proviso of § 270(a). In [*MacEvoy*] this Court construed § 270b(a) to limit the protection of a Miller Act bond to those who had a contractual agreement with the prime contractor or with a 'subcontractor'. Those in more remote relationships, including persons supplying labor or material to a mere materialman, were found not to be protected." 417 U.S. at 122.

[*] Although the Court in *Carter* reaffirmed the limitations of the Act under its earlier decision in *MacEvoy*, it noted that the limitation of § 2(a), which is in issue in the instant case, was inapplicable under the facts of the *Carter* case because there the union trustees were claiming sums on behalf of workmen who supplied labor for the project directly to the prime contractor under an express contract with him. 353 U.S. at 217.

In *Rich*, the prime contractor, F. D. Rich Co., had a direct contractual relationship with Cerpac Co. who was to supply and install certain millwork and exterior plywood. Cerpac, in turn, ordered its requirements for exterior plywood from Industrial Lumber Co. The issue was whether Cerpac was a "subcontractor" for the purposes of the Miller Act or a mere materialman. This Court applied the "functional" definition of "subcontractor" previously adopted in *MacEvoy* and held that Cerpac was a "subcontractor" and, since Industrial, as a material supplier, had a direct contractual relationship with Cerpac, Industrial was protected under the Miller Act.

The "substantial relationship" test discussed in *Rich* as being the test of whether one is a subcontractor must be interpreted in the light of the facts of that case, which are far different from the facts of the present case. This Court in *Rich* had before it only the issue of whether Cerpac was a "subcontractor" or a materialman. Irrespective of whether Cerpac was a subcontractor or a mere materialman, there existed a contractual relationship between Cerpac and the prime contractor. No such contractual relationship existed between Colquitt and Bateson, the prime contractor, in the present case. We can find nothing in this Court's opinion in *Rich* indicating that this Court no longer considers it necessary for a "subcontractor" to have any contractual relationship with the prime contractor.[5] In *Rich* this Court merely said that the total

[5] In affirming the Court of Appeals' holding in *Rich* that Cerpac was a subcontractor for Miller Act purposes, this Court cited *Aetna Casualty & Surety Co.* v. *United States ex rel. Gibson Steel Company* 382 F. 2d 615 (5th Cir. 1967); *Basich Bros. Construction Co.* v. *United States ex rel. Turner*, 159 F. 2d 182 (9th Cir. 1946); *United States ex rel. Briant* v. *Lembke Construction Co.*, 370 F. 2d 293 (10th Cir. 1966); and *Travelers Indemnity Co.* v. *United States ex rel. Western Steel Co.*, 362 F. 2d 896 (9th Cir. 1966). It should be noted that in all of these cases the middle party, whose status as a subcontractor or materialman was in issue, had a direct contractual relationship with the prime contractor.

relationship between Cerpac and Rich must be looked at, "not just the contract" between those parties, to determine whether Cerpac was a subcontractor. 417 U.S. at 124. To say that the total relationship must be looked at is not tantamount to saying that no contractual relationship between the middle party and the prime contractor is necessary to make that party a subcontractor, for this would give the term "subcontractor" a new meaning far different from that established by usage in the building trades and recognized by this Court in *MacEvoy* and *Rich*.

In *MacEvoy* this Court defined a "subcontractor" as

> "* * * one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract * * *" 322 U.S. at 109.

The above definition was expressly reaffirmed by the Court in *Rich*. 417 U.S. at 123.

The fact that Colquitt performed a portion of the work called for under the prime contract is not sufficient to make Colquitt a "subcontractor" because Colquitt did not perform for and take such work from Bateson, the prime contractor but, on the contrary, Colquitt performed for and took such work from Bateson's subcontractor, Pierce, with whom Colquitt had a contract.[6]

[6] cf. *Continental Casualty Co.* v. *North American Cement Corp.*, 91 F. 2d 307, 308 (1937), where the Court of Appeals for the Dis-

Quite clearly, the Court of Appeals has misinterpreted the decisions of this Court in *MacEvoy* and *Rich*. The Court of Appeals recognized that Colquitt was "technically a sub-subcontractor".[7] Nevertheless, the Court of Appeals disregarded the definition of the term "subcontractor" set down by this Court and the commonly understood meaning of that term. The Court of Appeals has thus eliminated the limitation of the proviso of § 270b(a) from the Act. We submit that neither *MacEvoy* nor *Rich* permit such a result.

2. The Decision Of The Court Of Appeals For The District Of Columbia Circuit Is Contrary To The Holdings Of The Courts Of Appeals For The First, Fourth, Fifth And Ninth Circuits And Other District Courts Which Holdings Are Consistent With The Decisions Of This Court And Are Correct Interpretations Of the Miller Act.

The United States Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits [8] have all held that a third tier subcontractor (the contractual tier of the respondents in this case) is too remote to be entitled to recover on a Miller Act bond.

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trict of Columbia Circuit expressed the opinion that the District of Columbia statute, which contained language identical to the Heard Act, *supra.*, should not be construed as giving protection to any person doing work or furnishing materials in carrying out the contract, however remote the relationship to the contractor.

[7] App. to petition for writ of certiorari p.4a, 551 F.2d at 1286.

[8] *United States ex rel. Powers Regulator Co.* v. *Hartford Accident & Indemnity Co.*, 376 F.2d 811 (1st Cir. 1967); *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Frederick Raff Co.*, 271 F. 2d 415 (1st Cir. 1959); *United States ex rel. Dukane Corporation* v. *United States Fidelity & Guaranty Co.*, 422 F. 2d 597 (4th Cir. 1970); *Elmer* v. *United States Fidelity & Guaranty Co.*, 275 F. 2d 89 (5th Cir. 1960), *cert.* denied, 363 U.S. 843 (1960) *Fidelity & Deposit Co. of Maryland* v. *Harris*, 360 F. 2d 402 (9th Cir. 1966).

Except for the holding of one District Court,[9] which holding was expressly rejected by the First, Fifth, and Ninth Circuits,[10] and by other District Courts,[11] the decision of the Court of Appeals for the District of Columbia Circuit stands alone. Interestingly enough, the District of Columbia Circuit's definition of the term "subcontractor" is at variance with the definition of that term adopted under an earlier decision of that Court decided under the District of Columbia mechanics' lien law.[12]

The leading Court of Appeals decision on the subject is the 1960 decision of the Fifth Circuit in *Elmer* v. *United States Fidelity & Guaranty Co.*, 275 F. 2d 89 (5th Cir. 1960), *cert.* denied, 363 U.S. 843 (1960). In *Elmer*, the Tyler-Hyde Construction Company contracted with the United States for grading, asphalt paving and concrete paving at Key Field Airport, Meridian, Mississippi. United States Fidelity & Guaranty Company was surety on the Miller Act bond. Tyler-Hyde subcontracted the grading and asphalt paving to T. F. Scholes Company, which, in turn, sub-

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[9] *McGregor Architectural Iron Co.* v. *Merritt-Chapman & Scott Corp.*, 150 F. Supp. 323 (D. Pa. 1957).

[10] *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Raff, supra; Elmer* v. *United States Fidelity & Guaranty Co., supra; Fidelity & Deposit Co. of Maryland* v. *Harris, supra.*

[11] *United States ex rel. Newport News Shipbuilding & Dry Dock Co.* v. *Blount Bro. Constr. Co.*, 168 F. Supp. 407, 411 (D. Md. 1958), *United States ex rel. Jonathan Handy Co., Inc.*, v. *Deschenes Constr. Co.*, 188 F. Supp. 270, 272 (D. Mass. 1960); *United States ex rel. Whitmore Oxygen Co.* v. *Idaho Crane & Rigging Co.* 193 F. Supp. 802, 803 (D. Idaho 1961).

[12] *Battista* v. *Horton*, 128 F. 2d 29, 31 (D.C. Cir. 1942).

subcontracted the asphalt paving to Acme Asphalt Company. The claimant, Elmer, was employed by Acme to perform inspection and testing services. Tyler-Hyde knew that Elmer was rendering services on the job.

Applying this Court's definition of the term "subcontractor" as set forth in *MacEvoy,* the Fifth Circuit found that Scholes was a sub-contractor of Tyler-Hyde and since Acme had a contractual relationship with the subcontractor Scholes, Acme would have been covered by the bond. But Acme was not a subcontractor since "it performed its work for Scholes rather than for the prime contractor, Tyler-Hyde." 275 F.2d at 90. Thus, Elmer was not covered by the bond because he had no contractual relationship with a subcontractor but only with the sub-subcontractor, Acme.

In United States ex rel. Powers Regulator Co. v. *Hartford Accident & Indemnity Co.,* 376 F. 2d 811 (1st Cir. 1967), the First Circuit, relying on *MacEvoy,* Elmer and the First Circuit's earlier decision in *United States ex rel. W. J. Halloran Steel Erection Co.* v. *Frederick Raff Co.,* 271 F. 2d 415 (1st Cir. 1959), held that a sub-sub-subcontractor (i.e., one having a contractual relationship with a sub-subcontractor) was too remote to be entitled to recover on a Miller Act bond.

The Fourth Circuit, in *United States ex rel. Dukane Corp.* v. *United States Fidelity & Guaranty Co.,* 422 F. 2d 597 (4th Cir. 1970), held that a material supplier of a sub-subcontractor "was too remote, too far down the line and had no protected status under the Act." 422 F. 2d at 600, citing *MacEvoy* and *Elmer.*

In *Fidelity & Deposit Co. of Maryland* v. *Harris,* 360 F. 2d 402 (9th Cir. 1966), the Ninth Circuit rejected

the argument, advanced by respondents in the present case, that any subcontractor, no matter how far down the line his contract was negotiated, who performs on the project an integral part of the work required by the prime contract, is entitled to Miller Act protection. 360 F.2d at 408. A renter of trucks to a sub-subcontractor was thus denied recovery.

Although the foregoing decisions pre-date this Court's decision in *Rich,* each of them merely applied this Court's definition of the term "subcontractor" as set forth in *MacEvoy,* namely, one who performs for and takes from the prime contractor a portion of the work called for under the prime contract. This definition was not changed by *Rich.* 417 U.S. at 123. The substantiality and importance of Cerpac's relationship with the prime contractor in *Rich* was looked at by the Court only to determine whether Cerpac was a "subcontractor" under the foregoing definition or a mere materialman. If there has been no contractual relationship between Cerpac and the prime contractor, it would not have been necessary for the Court to reach that issue.

We believe that the decisions of the Courts of Appeals for the First, Fourth, Fifth and Ninth Circuits are entirely consistent with the decisions of this Court and that they are correct interpretations of the Miller Act. The decision of the Court of Appeals for the District of Columbia Circuit, on the other hand, is an incorrect interpretation of the Act.

There are many subcontractors on large government contracts, and many sub-subcontractors, sub-sub-subcontractors and persons supplying them with labor and materials. The relationship between the employees of a

sub-subcontractor and that sub-subcontractor is one of the "more remote relationships" referred to by this Court in *MacEvoy* and *Rich* and in the legislative history of the Act.[13]

If the Court of Appeals' decision is affirmed, thus extending the coverage of the Miller Act bond to persons having no contractual relationship with either the prime contractor or subcontractor, but only with a sub-subcontractor, or with a sub-sub-subcontractor or perhaps a sub-sub-sub-subcontractor, it will be extremely difficult if not impossible, for a prime contractor to protect himself from claims under the bond. We believe that when this Court said in *MacEvoy,* that it was easy for the prime contractor to protect himself from "the relatively few subcontractors who perform part of the original contract" by requiring the subcontractors to give security by bond,[14] this Court had in mind those "subcontractors" with whom the prime contractor had subcontract agreements, not those in more remote relationships,[15] as in the case at bar.

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[13] cf. *United States ex rel. Newport News Shipbuilding & Dry Dock Co.* v. *Blount Bros. Const. Co.*, 168 F. Supp. 407 (D. Md. 1958).

[14] 322 U.S. at 110.

[15] Bateson did, in fact, require an indemnity agreement from its subcontractor, Pierce Associates. Pierce, believing that the protection of the Miller Act did not extend beyond Colquitt, required no indemnity agreement or bond from Colquitt. Under the Court of Appeals' decision, it will now be necessary for subcontractors to also require their sub-subcontractors to give surety by bond to protect themselves. However, in many cases, small sub-subcontractors will not be able to furnish such bonds and an indemnity agreement from an insolvent sub-subcontractor offers no protection. Additionally, the increased cost of the bond premiums will ultimately be passed on the government in the form of increased prime contract prices.

3. The Court Of Appeals' Interpretation Of The Miller Act Is Clearly Contrary To The Expressed Intent Of Congress.

The purpose of the Miller Act is to provide protection to those supplying labor or materials to a contractor on a federal construction project. Since a mechanic's lien cannot attach to government property, an alternative remedy is provided through the procedure of requiring that the prime contractor furnish a payment bond. The legislative history of the Miller Act makes it clear that the Congress intended to extend the protection of a Miller Act bond only to third tier contractors:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." H.Rep.No. 1203 (74th Cong., 1st Sess.), p.3.

The use of the term "sub-subcontractor" in the Committee Report quoted above negates any contention that Congress intended to extend the protection of the Miller Act bond to the employees of a "sub-subcontractor" or beyond.

The limitation of Section 2(a) of the Miller Act, 40 U.S.C. § 270b(a), recognized by this Court in *MacEvoy* and *Rich,* is precisely the limitation referred to in the legislative history of the Act, namely, persons furnishing labor or material to a "subcontractor", i.e., one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract. A sub-subcontractor is within this protected category as well as a materialman of a sub-

contractor. But the employees of a sub-subcontractor are one step removed from the protection of the Act.

CONCLUSION

For the reasons set forth herein, it is submitted that the Court of Appeals for the District of Columbia Circuit has misinterpreted the decisions of this Court and the applicable provisions of the Miller Act. On the contrary, the decisions of the Courts of Appeals for the First, Fourth, Fifth, and Ninth Circuits are correct interpretations of the Act. The decision of the court below should therefore be reversed.

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